# APPENDIX

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# United States Court of Appeals
## For the First Circuit

No. 17-1597

UNITED STATES OF AMERICA,

Appellee,

v.

MUSTAFA HASSAN ARIF,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Landya B. McCafferty, U.S. District Judge]

Before

Torruella, Lynch, and Kayatta,
Circuit Judges.

Benjamin Brooks, with whom Michael Schneider and Good Schneider Cormier & Fried were on brief, for appellant.

Seth R. Aframe, Assistant United States Attorney, with whom Scott W. Murray, United States Attorney, was on brief, for appellee.

July 18, 2018

**LYNCH, Circuit Judge.** Mustafa Hassan Arif operated a very profitable online business from Lahore, Pakistan, selling non-prescription drug products that purported to treat or cure hundreds of different diseases and medical conditions. He created and operated over 1,500 websites containing altered clinical studies, fabricated testimonials, and false indicia of origin to induce consumers in the United States and elsewhere to purchase his products. Through his misdeeds, Arif gained more than $11 million in revenues. He conditionally pled guilty to wire fraud in 2016, preserving two arguments for appeal that the district court had rejected in two thoughtful memoranda. See United States v. Arif (Arif I), No. 15-cr-057 (D.N.H. Sept. 16, 2016); United States v. Arif (Arif II), No. 15-cr-57, 2016 WL 5854217 (D.N.H. Oct. 6, 2016). Arif was sentenced to seventy-two months of imprisonment.

On appeal, Arif's primary argument is that he was prosecuted under the wrong statute. We reject Arif's argument that prosecutions such as his must be pursued exclusively by the Federal Trade Commission ("FTC") as false advertising cases, and not by the Department of Justice ("DOJ") as wire fraud cases.[1] As

[1] Arif never maintained in district court that the criminal provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 52-57, must be prosecuted by the FTC. Rather, he argued that the DOJ may only initiate a prosecution for violations of these provisions upon certification from the FTC under 15 U.S.C. § 56(b). The district court rejected this argument, and Arif has abandoned

an issue of first impression, we hold that Congress did not impliedly repeal the wire fraud statute, 18 U.S.C. § 1343, as to prosecutions that also fall within the reach of the 1938 Wheeler-Lea Amendment to the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §§ 52-57.[2]

Arif also argues that, as a matter of law, he could not have committed fraud because he "held an honest and sincere belief in the efficacy of his products," and he correctly identified their ingredients.

Arif's remaining arguments are that his seventy-two month sentence must be vacated because the district court's Guidelines calculation as to the loss amount was erroneous and, further, because the court did not "adequately account" in its sentence for the fact that his penalty would have been lower had he been charged under the FTCA.

All of Arif's arguments are without merit. Accordingly, we affirm both his conviction and sentence.

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it on appeal. See Small Justice LLC v. Xcentric Ventures LLC, 873 F.3d 313, 323 n.11 (1st Cir. 2017) (holding that arguments not raised in appellant's opening brief are waived).

[2] One motivation for Arif's argument seems to be that under the FTCA, there is a six-month maximum penalty for a first offense, and a one-year maximum for a second offense. See 15 U.S.C. § 54(a). In contrast, there is a twenty-year maximum sentence for fraud under the wire fraud statute. See 18 U.S.C. § 1343.

## I. Facts

The following facts are drawn from Arif's conditional guilty plea and from the district court's findings of fact.

Arif ran an elaborate, multi-million-dollar online business from Lahore, Pakistan, selling non-FDA-approved drugs that purported to cure hundreds of different diseases and medical conditions. He primarily operated his business through MAK International, a "parent company" he owned. Arif also worked with CCNow, a third-party payment processor based in the United States.

To sell his products, Arif created, maintained, and controlled more than 1,500 websites. Over 1,000 of these websites directly offered drugs for sale, with each individual website selling a single drug that purported to treat a single disease or medical condition. The remaining 400 or so websites were "referral" sites, which purported to be "independent and impartial," but were, in fact, conduits to one or more of Arif's websites selling his products.

Arif organized his websites into subnetworks or groups, each with a unique brand name and color scheme. These included Berlin Homeo (comprising more than 250 sites), Botanical Sources (comprising more than 200 sites), Gordon's Herbal Research Center (comprising more than 120 sites), Healing Plants Ltd. (comprising more than 60 sites), Oslo Health Network (comprising more than 300 sites), and Solutions by Nature (comprising more than 70 sites).

He also created two referral networks: "Society for the Promotion of Alternative Health" and "Toward Natural Health." In general, each website within a group "contained the same verbiage," with "the only material difference being the name of the disease or medical condition, the name of the drug, and the variations in the purported ingredients."

All of the websites contained misleading mail-forwarding addresses that were "intended to make customers more comfortable purchasing the drugs." For instance, websites in the Berlin Homeo network included an address in Germany. Websites in the other networks contained forwarding addresses in Italy, New Zealand, Australia, Norway, Denmark, England, and Scotland. In fact, all of the drugs originated in Pakistan.

Most of the websites also contained various other false and misleading statements. For instance, many websites in the Solutions by Nature group contained the following (completely fabricated) treatment statistics:

> [Name of drug] has been shown in clinical trials to provide a complete [name of disease or medical condition] cure rate for 90% of subjects. [Name of drug] has been proven an effective [name of disease or medical condition] medication for 95% of people, significantly improving their condition. Like no other product, has also been shown to be a highly effective [name of disease or medical condition] treatment in people with severe cases, a response rate of 85%.

Additionally, certain websites contained links to plagiarized research papers, which "were not written about the drugs they purported to reference." And many touted fictitious testimonials by customers.

Arif sold the drugs globally, generating approximately $12 million in sales between 2007 and 2014, more than $9 million of which came from customers in the United States. CCNow processed his customers' online payments and then sent the proceeds from its bank account in Minnesota to Arif's bank accounts in Pakistan and the United Kingdom via wire transfers through JP Morgan Chase.

On April 8, 2015, a federal grand jury in the District of New Hampshire indicted Arif on one count of wire fraud and aiding and abetting the same, in violation of 18 U.S.C. §§ 1353 and 2, and two counts of shipment of misbranded drugs in interstate commerce, in violation of 21 U.S.C. §§ 331(a), 333(a)(2), and 352(a).[3] A superseding indictment was filed on September 9, 2015,

[3] The briefs provide no information on the origins of the investigation into Arif's businesses. However, Arif's indictment and pre-trial briefing offer the following account. On or about April 14, 2010, an undercover agent from New Hampshire purchased a product from one of Arif's websites. When Arif landed in New York City on February 2, 2014, Department of Homeland Security special agents were notified and drafted a criminal complaint charging Arif with wire fraud. The agents appeared before a magistrate judge in the district of New Hampshire on February 7th, and an arrest warrant was issued that same day. The original February 2014 criminal complaint against Arif was sealed until he was arrested in the Southern District of New York.

adding two additional counts of shipment of misbranded drugs in interstate commerce and aiding and abetting the same.

Arif waived his right to a jury trial. He filed two pre-trial motions asking the district court to rule, as a matter of law, on his good faith defense (that he lacked the requisite intent to defraud), and on his jurisdictional defense (that the 1938 amendment to the FTCA "preempted" the wire fraud statute as to his offense). The district court denied the motions in two separate orders.

On October 11, 2016, Arif pled guilty to one count of wire fraud, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, reserving the right to appeal the district court's adverse rulings. He was sentenced to seventy-two months of imprisonment on May 26, 2017. On appeal, Arif challenges his conviction and sentence.

## II. Analysis

### A. The FTCA Does Not Impliedly Repeal the Wire Fraud Statute

Throughout his briefing, Arif couches his argument as one of the "preemptive effect" of the FTCA over the wire fraud statute. We believe that this categorization is incorrect. In the end, the issue is one of congressional intent. "The proper mode of analysis" in situations such as this, when there is an alleged conflict between an earlier and a later statute is "that

of implied repeal." State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 703 (1st Cir. 1994).

"The cardinal rule is that repeals by implication are not favored." Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936); see also Narragansett, 19 F.3d at 703. The federal judiciary must faithfully adhere to this rule of construction not only as a matter of logic, but also, of principle. It serves to honor the doctrine of separation of powers by showing respect for the legislative branch.

> A steady adherence to [the implied repeal doctrine] is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985) (Scalia, J.).

We put aside the fact, inconvenient to Arif,[4] that the FTCA provision said to impliedly repeal the wire fraud statute was

[4] Arif's premise that an earlier Congress can preclude a later Congress from enacting new laws is itself unsound. See Ray v. Spirit Airlines, Inc., 767 F.3d 1220, 1225 (11th Cir. 2014) (holding that "[r]egardless of whether the FAA established a

enacted in 1938, see 15 U.S.C. § 54, long before the wire fraud statute came into effect in 1952, see 18 U.S.C. § 1343. Because the wire fraud statute was premised on the mail fraud statute, however, and that statute was first enacted in 1872, see Skilling v. United States, 561 U.S. 358, 399 (2010), we will assume arguendo, in Arif's favor, that the wire fraud statute came first and that the usual rules for evaluating implied repeal apply.

The Supreme Court has long held that repeals by implication may not be found "unless [Congress's] intent to repeal is 'clear and manifest.'" Rodriguez v. United States, 480 U.S. 522, 524 (1987) (per curiam) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)). This, in turn, requires either a showing that "the later act covers the whole subject of the earlier one and is clearly intended as a substitute," Posadas, 296 U.S. at 503, or that an "irreconcilable conflict" exists between the provisions of the two statutes, Rodriguez, 480 U.S. at 524.

Under the first test, this is plainly not a situation where a later statute (here, assuming arguendo, the FTCA is later), covers the same subject matter as an earlier statute (again, assuming arguendo the wire fraud statute is earlier) so comprehensively that it is meant as a substitute.

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'comprehensive federal regulatory scheme governing air carriers,'" the "1958 FAA could not have repealed any part of the yet-to-be-born 1970 RICO statute" (quoting Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1250 (6th Cir. 1996))).

So we focus instead on the second test: whether there is an "irreconcilable conflict" between the two statutes. We find no such conflict on the face of the statutes.[5] To state the obvious, the FTCA and the wire fraud statute address different activities. The wire fraud statute requires the use of "wires"; the FTCA does not. Compare 18 U.S.C. § 1343 (proscribing "[f]raud by wire, radio, or television"), with 15 U.S.C. § 52 (proscribing the "[d]issemination of false advertisements"). Further, the FTCA applies only to false advertising, whereas the wire fraud statute covers fraud generally.[6] See, e.g., United States v. Meléndez-González, 892 F.3d 9, 13-14, 20 (1st Cir. 2018) (affirming wire fraud conviction for submitting false information to the military in order to obtain recruitment bonuses).

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[5] Since the text of the statutes is clear, we do not resort to examining the legislative history. See Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017) (holding that a "controlling principle" of statutory interpretation is "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written" (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992))). However, in an abundance of caution, we add that the legislative history of the two statutes, as described in the parties' briefing, does not even begin to show any conflict. The arguments are described later in the text of this opinion.

[6] Indeed, "both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute," the predecessor to the wire fraud statute at issue in this case. See Jed S. Rakoff, The Federal Mail Fraud Statute, 18 Duquesne L. Rev. 772-73 (1980).

Even if the two statutes do overlap in some situations, such as this one, "[that] is not enough to establish" an implied repeal; the FTCA "may be merely affirmative, or cumulative or auxiliary" to the wire fraud statute. Ray v. Spirit Airlines, Inc., 767 F.3d 1220, 1225 (11th Cir. 2014) (quoting Wood v. United States, 41 U.S. 342, 363 (1842)). That Arif cannot point to any "positive repugnancy" between the two statutory provisions is fatal to his claim of implied repeal. Wood, 41 U.S. at 363.

Further, the Supreme Court has held that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional contention to the contrary, to regard each as effective." FCC v. NextWave Personal Commc'ns Inc., 537 U.S. 293, 304 (2003) (quoting J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l Inc., 534 U.S. 124, 143-44 (2001)). Co-existence is more than possible here.

Arif purports to find support for the contrary in the Supreme Court's decision in Dowling v. United States, 473 U.S. 207 (1985). But Dowling is not a case about implied repeal at all. It dealt with an issue of statutory interpretation: whether the felony provision of the National Stolen Property Act, 18 U.S.C. § 2314, extended to the interstate transportation of bootlegged records. See Dowling, 473 U.S. at 208. Because the statutory language was ambiguous, the Court turned to legislative history. See id. at 218. It concluded that "Congress had no intention to

reach copyright infringement when it enacted § 2314," id. at 226, given its later enactment of amendments to the Copyright Act, which included criminal penalties for infringement. See id. at 225-26. The Court's approach in Dowling to statutory interpretation is inapplicable here because the text of the wire fraud statute is clear. And Arif makes no argument that the plain language of the statute does not embrace his conduct.

Arif nevertheless insists that we turn to the legislative history of the FTCA because he says that it shows Congress intended the FTC to have sole enforcement authority over false advertising cases. He cites to three cases that he argues establish, as a matter of statutory construction, that the wire fraud statute cannot be read to reach his conduct: Tamburello v. Comm-Tract Corp., 67 F.3d 973 (1st Cir. 1995), United States v. Boffa, 688 F.2d 919 (3d Cir. 1982), and Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). None of these cases are helpful to him.

Tamburello and Boffa both concern unfair labor practices, defined by the National Labor Relations Act ("NLRA"), which is administered by the National Labor Relations Board ("NLRB"). See Tamburello, 67 F.3d at 976; Boffa, 688 F.2d at 927. But the NLRA and FTCA are not analogous. Congress clearly intended the NLRA to be a "uniform, nationwide body of labor law interpreted by a centralized expert agency -- the [NLRB]." Tamburello, 67

F.3d at 976. And the Supreme Court has long recognized the primary jurisdiction of the NLRB. See Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 365 (1940).

Here, were we forced to consider it, the legislative history of the 1938 Wheeler-Lea Amendment shows quite the opposite of what Arif argues. The House Report supporting the amendment's enactment clearly states that the "criminal offenses will not be prosecuted by the Federal Trade Commission, but through the Department of Justice." H.R. Rep. No. 75-1613, at 6 (1937). There is no indication whatsoever that Congress intended all cases involving false advertising to be prosecuted solely by the FTC under the FTCA and no other criminal statute.

Arif cites Holloway, but that case only held that the FTCA does not create a private right of action, 485 F.2d at 999, an issue not presented here. The D.C. Circuit gave an informative description of the FCTA and the 1938 Wheeler-Lea Amendment, no part of which suggests that Congress intended to preclude criminal wire fraud prosecutions for conduct also covered by the FTCA. See id. at 992-97.

It is true that the Third Circuit held in Boffa that the mail fraud statute does not extend to deprivations of rights which are created only by section 7 of the NLRA. 688 F.2d at 930. But that case is inapposite here. The FTCA created no rights, unlike the statutory creation in the NLRA of the duty of fair

representation, which was enforced by the NLRB in a comprehensive scheme. Further, Boffa itself expressly held that the NLRA did not impliedly repeal the mail fraud statute as to conduct that was "arguably prohibited" by the NLRA and "independently prohibit[ed]" by the mail fraud statute. Id. at 932.

Tamburello is also plainly inapposite. It concerned the reach of the NLRB's primary jurisdiction over a private, non-governmental cause of action alleging a RICO extortion claim. See Tamburello, 67 F.3d at 976. As we held there, the NLRB had exclusive jurisdiction because none of the conduct "[was] illegal without reference to the NLRA. It is the NLRA that prohibits employers from creating intolerable working conditions to discourage union activities." Id. at 978 (citations omitted). That is not at all the situation here.

To the extent Arif tries to find significance in the lower penalties associated with prosecutions under the FTCA, his argument also goes nowhere. The Supreme Court squarely rejected this notion in United States v. Batchelder, 442 U.S. 114 (1979). There, the Court held that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." Id. at 123-24.

We have also rejected arguments of implied repeal of the wire fraud statute by another statute on this basis. In United

States v. Brien, 617 F.2d 299 (1st Cir. 1980), we held that the Commodities Futures Trading Act, a statute targeting the specific type of fraud in that case, did not impliedly repeal the general mail and wire fraud statutes, even though it carried a lesser maximum sentence. See id. at 309-310, 310 n.14. We further noted that "[t]he government's election to prosecute appellants under the statute which, at the time, provided the more severe penalty, was an exercise of discretion that violated no rights of appellants." Id. at 310-11.

Other circuits have adopted similar reasoning. See Hansen, 772 F.2d at 945 (government could charge defendant criminally under 18 U.S.C. § 1001 for making false statements, instead of under the Ethics in Government Act, which only imposes civil penalties); United States v. Zang, 703 F.2d 1186, 1196 (10th Cir. 1982) (misdemeanor provisions of the Emergency Petroleum Allocation Act did not impliedly repeal the mail and wire fraud statutes as to conduct that violated both); United States v. Burnett, 505 F.2d 815, 816 (9th Cir. 1974) (government could charge defendant criminally under § 1001, instead of under a specific misdemeanor statute for making false statements to obtain unemployment benefits).

This case provides a good example for why Congress has vested discretion in the prosecutorial agencies as to which statute to employ. The offense here was not a run-of-the-mill false

advertising of a single product. Arif, in order to make millions, mounted an elaborate worldwide scheme to defraud: he deliberately posted numerous false and misleading statements on over a thousand websites that he created and maintained in order to gull those with medical ailments into purchasing his products. The FTCA penalties for first or second offenders would hardly have been an adequate deterrent for such egregious conduct. Crime must be made not to pay.

B. Rejection of Arif's Defense as to Intent to Defraud

Arif next argues that the district court erred in rejecting his defense that he did not commit wire fraud because he was pure of heart and mind as to the efficacy of his products.

Both parties requested that the district court rule on this defense before trial, based on the agreed-upon stipulated facts.[7] The court also considered Arif's assertions in his pro se briefs, which the court construed in his favor (such as accepting Arif's assertion that he had a good-faith belief in the efficacy

[7] Arif's counsel presented, but refused to endorse, Arif's good faith defense in its trial briefing. Consequently, Arif sought leave to argue his good faith defense pro se. The district court permitted him to do so. Arif then filed a pre-trial motion asking the district court to rule on the issue as a matter of law. Shortly after the district court denied this motion, Arif pled conditionally guilty, reserving the right to challenge the district court's ruling.

of the drugs[8] that he had sold on his websites). Arif insists on appeal, as he did before the district court, that he is entitled to a finding that he lacked the requisite intent to commit wire fraud as a matter of law.

The well-established elements of wire fraud are: "(1) a scheme or artifice to defraud using false or fraudulent pretenses; (2) the defendant's knowing and willing participation in the scheme or artifice with the intent to defraud; and (3) the use of the interstate wires in furtherance of the scheme." United States v. Appolon, 715 F.3d 362, 367 (1st Cir. 2013). The district court correctly rejected Arif's legal defense that the elements of the wire fraud statute were not met because he did not subjectively intend to commit fraud.

Arif's argument misapprehends the nature of his charged offenses. The trial judge accurately ruled that Arif was not being charged "with selling drugs that did not work as intended . . . or for harming his customers." Rather, he was charged with "making misrepresentations on his websites," which were designed to give false comfort to buyers, in order to induce their purchases. Specifically, Arif pled guilty to knowingly misrepresenting, inter

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[8] The district court used the definition of "drug" in the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 321(g)(1). Arif's brief uses the language "homeopathic and naturopathic herbal remedies," but he does not deny that the products are drugs under the FDCA.

alia, that: (1) there was clinical research showing outstanding results for the drugs he sold, including specific cure rates; (2) actual customers attested to the efficacy of the drugs; and (3) his businesses were operating from various western countries.

Those admissions are more than enough to satisfy the intent requirement. In United States v. Mueffelman, 470 F.3d 33 (1st Cir. 2006), this court expressly held that a wire-fraud defendant cannot "knowingly . . . make false statements to secure money from clients" even if he subjectively "believe[s] that his enterprise w[ill] succeed."[9] Id. at 37. So too here. Arif's belief in the efficacy of his products does not negate his fraudulent intent when he knowingly made false statements that went to the heart of his customer's purchases.

Arif counters that the district court erred in relying on Mueffelman because that case dealt with financial fraud, whereas his case concerns "a form of alternative medicine." We do not see

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[9] Our Mueffelman ruling is in accord with the ruling of other circuits that a defendant's subjective good-faith belief in the efficacy of the product does not negate his intent to defraud when the defendant has made false statements to induce purchase. See United States v. Spirk, 503 F.3d 619, 622 (7th Cir. 2007) (holding that a good-faith belief that investors would profit does not negate defendant's intent to defraud); United States v. Benny, 786 F.2d 1410, 1417 (9th Cir. 1986) (holding that although an honest belief in the truth of misrepresentations may negate an intent to defraud, a good-faith belief that the victim will suffer no loss is "no defense at all"); accord United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984); Sparrow v. United States, 402 F.2d 826, 828 (10th Cir. 1968); United States v. Painter, 314 F.2d 939, 943 (4th Cir. 1963).

this supposed distinction. A lie is a lie, whether it is in the form of a falsified financial statement or a falsified clinical study of a drug. There was no error.

Further, Arif's reliance on the Sixth Circuit's opinion in Harrison v. United States, 200 F. 662 (6th Cir. 1912) -- a more-than-a-century-old decision that predates both the FTCA and the wire fraud statute -- is also misplaced. Arif asserts that Harrison stands for the proposition that "misrepresentations . . . relating to the advertised efficacy" of a product are merely "a form of puffery or exaggeration," as long as "there [is] an 'inherent utility' to the product sold." Not so. Harrison never held as much. Arif's proposed reading contradicts the substantial body of law that establishes that the demarcation line is between misrepresentations that go to the essence of a bargain and those that are merely collateral. See, e.g., United States v. Regent Office Supply Co., 421 F.2d 1174, 1179-1181 (2d Cir. 1970).

Here, the misrepresentations Arif made were plainly material. By falsifying the origin of his products, clinical studies about them, and customer testimonials, Arif clearly intended to deprive his victims of the "facts obviously essential in deciding whether to enter the bargain." United States v.

London, 753 F.2d 202, 206 (2d Cir. 1985). This is not a case of mere exaggeration or puffery.[10]

We also reject Arif's argument that the disclaimer on the third-party credit-card processor's website shows that the trial judge erred. That disclaimer stated, in pertinent part:

> [T]he product(s) purchased are not intended to diagnose, mitigate, treat, cure or prevent any disease or health condition, and I will not use any information or statements contained on the website through which this product is purchased, or contained on or in such product(s), for such purposes.

Arif argues that after reading this statement, any potential customer of "reasonable prudence" would have known not to rely on the other statements made on his websites; therefore, "the misrepresentations did not persist through the point of sale." But reliance is not an element of wire fraud. Cf. Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 642, 649-50 (2008) (holding that "a showing of reliance" is not required for mail fraud). Accordingly, the presence of a disclaimer does not defeat Arif's criminal liability under the wire fraud statute. See United

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[10] Also beside the point is Arif's argument that the trial judge erred in not drawing a distinction "between a lie or misrepresentation[] and a specific intent to defraud." This assertion boils down to an argument that Arif's misrepresentations were not material. As explained above, these misrepresentations in sum were plainly material. We do not disaggregate the different types of misrepresentations charged, and so do not reach questions of whether any one of them, independently, would suffice. Nor does Arif make such an argument.

States v. Weaver, 860 F.3d 90, 95 (2d Cir. 2017); United States v. Ghilarducci, 480 F.3d 542, 546-47 (7th Cir. 2007).

Finally, Arif argues that even if his intent argument was irrelevant, he nonetheless should have been able to present his good-faith belief to the fact finder, in the hopes of exoneration. That is not how the issue was framed to the trial court, so the argument is waived. And there is no Sixth Amendment right to present a defense based on irrelevant evidence. See United States v. DeCologero, 530 F.3d 36, 72-74 (1st Cir. 2008).

We add that, in any event, the argument is misplaced. Arif chose not to take his case to a jury or to have a bench trial. He chose to plead guilty, presumably because it would give him some benefits. After all, the prosecution agreed to dismiss the remaining four counts of shipping misbranded drugs in commerce and aiding and abetting the same, which each carried a maximum penalty of three years of imprisonment, see 21 U.S.C. § 333(a)(2). By pleading guilty, Arif reduced his potential sentence range.

C. There Was No Guidelines Calculation Error

We turn to address Arif's challenges to his sentence. First, he contends that the district court erred in calculating the Guidelines range by using Arif's total revenues, minus refunds, as the loss figure. Specifically, Arif argues that the sales from one group of websites, Botanical Sources, should have been excluded from the loss amount because those websites did not contain any

misrepresentations about the products, only a misleading forwarding address. He also argues that the government failed to prove that his customers were dissatisfied or suffered any pecuniary harm, as there were only five complaints out of over 128,000 transactions, and "only a small percentage of customers" sought refunds "even though the product was clearly marked as being from Pakistan." We see no error.

Under this court's decision in United States v. Alphas, 785 F.3d 775 (1st Cir. 2015), "a sentencing court may use the face value of the claims as a starting point in computing loss," where, as here, "defendant's claims were demonstrably rife with fraud." Id. at 784. "The burden of production will then shift to the defendant, who must offer evidence to show (if possible) what amounts represent legitimate claims." Id.

Here, the district court gave Arif the opportunity to show that a portion of the revenue obtained was not infected by the fraudulent misrepresentations and it concluded that he had presented insufficient evidence to that effect. There was no clear error in that factual conclusion. That some customers may not have been dissatisfied after making purchases from sites with false information has no bearing on the loss amount, which is intended to reflect the revenue from sales that were induced by Arif's fraudulent misrepresentations.

In any event, even if the loss calculation was in error, there would have been "no reasonable probability" of prejudice. Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016). The sentencing judge departed substantially downward from the Guidelines range. The judge explained that regardless of the Guidelines calculation, she would have "reach[ed] the same result with respect to the appropriate sentence, via this variance" because "a 72-month sentence is a fair and just sentence based on . . . the totality of circumstances and totality of facts in the record." Accordingly, any error would have been harmless. See id. at 1347; United States v. Romero-Galindez, 782 F.3d 63, 70 (1st Cir. 2015).

D. The Sentence Was Substantively Reasonable

Next, Arif argues that his sentence was substantively unreasonable because the trial judge "failed to take adequate account" of the six-month maximum sentence under the FTCA. Despite his failure to object at sentencing, we assume, favorably to Arif, that our standard of review is for abuse of discretion. See United States v. Tanco-Pizarro, 892 F.3d 472, 483 (1st Cir. 2018).

His argument clearly fails under any standard. The district court obviously was not restricted to the FTCA range of penalties, and it had been made well aware of that range. In imposing the seventy-two-month sentence, the court noted that Arif's colloquy at sentencing failed to demonstrate "complete and

utter total remorse." Nevertheless, the trial judge still imposed a sentence well below the recommended Guidelines range of 134 to 168 months.

There was no error at all in the sentence; it was not unreasonably long.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America

v.

Criminal No. 15-cr-57-LM
Opinion No. 2016 DNH 179

Mustafa Hassan Arif

**O R D E R**

The government has charged defendant, Mustafa Arif, with wire fraud in violation of 18 U.S.C. § 1343 (Count I) and four counts of introducing misbranded drugs into interstate commerce in violation of 21 U.S.C. §§ 331(a), 333(a)(2), and 352(a) (Counts II - V) ("misbranding of drugs"). The charges arise from alleged misrepresentations Arif made on his websites offering various drugs for sale.

Arif has filed two motions pursuant to Federal Rule of Criminal Procedure 12(b)(1), requesting that the court determine that two defenses he intends to offer at trial are viable. See doc. nos. 113 & 114. The government objects to both motions.

**Background**

The parties have agreed to 19 separate, detailed factual stipulations. See doc. no. 94. As the court summarized these facts in its September 16, 2016 order, see doc. no. 108, the court will refer to them in this order only where relevant.

To prove that Arif committed wire fraud, the government must prove that he participated in a scheme to defraud with the intent to defraud. To prove that Arif introduced misbranded drugs into interstate commerce, the government must prove that he acted with the intent to defraud or mislead.[1]

In his trial briefs, Arif stated that he intended to offer at trial a defense that he had a good faith belief in the efficacy of the drugs sold on his websites and, therefore, could not have had an intent to defraud for purposes of any of the charges ("good faith defense").[2] Arif proposed a hybrid approach to his defense: counsel would represent Arif on the entirety of his case with the exception of his good faith defense, and, on that defense, Arif would represent himself.

After a hearing on Arif's request for hybrid counsel, Arif requested that the court decide the issue of the viability of

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[1] Although the government may charge a defendant with introducing misbranded drugs into interstate commerce ("misbranding of drugs") as a misdemeanor, see 21 U.S.C. §§ 331(a) and 333(a)(1), the government has charged Arif with felony misbranding of drugs under 21 U.S.C. §§ 331(a) and 333(a)(2). Such a charge requires the government to prove that Arif committed the offense with the intent to defraud or mislead.

[2] The court has summarized the unique procedural history of this case in two prior orders. See doc. nos. 108 & 112. The court repeats in this order only that portion of the procedural history necessary for an understanding of the two pending motions.

his good faith defense as a matter of law prior to trial. In an order dated September 16, 2016, the court held that Arif's proposed good faith defense is not a viable defense to the "intent to defraud" element of the pending wire fraud and misbranding of drugs charges. See doc. no. 108.

At a hearing on that same date, the parties disclosed that the ruling had generated discussions about a conditional plea agreement. Arif informed the court that he intended to plead guilty to the wire fraud charge if he could retain his right to appeal two legal issues.[3] The two legal issues, briefly summarized, are: (1) whether Arif's proposed good faith defense is a viable defense to the "intent to defraud" element of the pending wire fraud and misbranding of drugs charges (the issue addressed in the court's September 16 order); and (2) whether the government would be precluded from prosecuting the wire fraud charge in the event the government failed at trial to prove certain alleged facts with respect to the misbranding of drugs charges (i.e., that the representations about the drugs constitute labeling as opposed to advertising) (the "jurisdictional defense").

[3] Federal Rule of Criminal Procedure 11(a)(2) allows a defendant to enter a conditional plea of guilty, "reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion."

There were two impediments to Arif's ability to enter into a plea and reserve his right to challenge the court's rulings on the two issues. First, the court had not issued an order or expressed any view, adverse to Arif or otherwise, on his jurisdictional defense. Second, although the court decided the first legal issue adversely to Arif, see doc. no. 108, that issue did not come before the court by way of "a specified pretrial motion" as required in Rule 11(a)(2). See doc. no. 108 (explaining the case's unique procedural history).

To resolve these procedural snags, the parties proposed that they place both issues before the court in a manner that would allow the court to rule, as required by Rule 11(a)(2), on "a specified pretrial motion." The court agreed to continue the trial for a short time (until October 11, 2016), to enable the parties to file their motions and objections, and allow the court to rule on the motions prior to the start of trial.

Arif has now filed two specified pretrial motions, pursuant to Federal Rule of Criminal Procedure 12(b)(1). The first is a "motion for pre-trial ruling regarding jurisdiction" (doc. no. 113). The second is "defendant's pro se motion for pretrial ruling - intent" (doc. no. 114). The government objects to both motions.

**Discussion**

Rule 12(b)(1) provides: "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." The parties agree that the court can determine the viability of Arif's jurisdictional defense and his good faith defense without a trial on the merits.

I. Jurisdictional Defense

Counts II through V of the superseding indictment charge Arif with misbranding of drugs with the intent to defraud or mislead in violation of 21 U.S.C. §§ 331(a) and 333(a)(2).[4] The superseding indictment alleges that the drugs were misbranded under 21 U.S.C. § 352(a) because their labeling, in this case, Arif's statements about the drugs on his websites, was false or misleading. Thus, if the government fails to prove at trial that Arif's statements about the drugs on his websites

[4] The government has argued in an earlier filing, see doc. no. 105 at n.4, that an "intent to mislead" is broader than an "intent to defraud." For purposes of this order, the court presumes, without deciding, that the term "intent to mislead" under the misbranding of drugs statute is, for all intents and purposes, identical to an intent to defraud. See United States v. Watkins, 278 F.3d 961, 966-69 (9th Cir. 2002). Therefore, the court will refer to the intent element of the charged offenses as "intent to defraud."

constitute labeling (as opposed to advertising), then Arif would be entitled to a verdict of not guilty on Counts II through V.

Arif's motion (doc. no. 113) asks the court to assume, for purposes of the motion, that the government would fail at trial to prove that Arif's statements about the drugs on his websites constitute labeling, and instead that they constitute merely advertising. Arif contends that, in such circumstances, the government would be precluded from prosecuting the wire fraud charge (Count I) on the basis of false advertising because the Federal Trade Commission ("FTC") has exclusive jurisdiction over false advertising of drugs. Arif asserts two arguments to support his theory of preclusion: 1) the Department of Justice cannot criminally charge a defendant with wire fraud based on false advertising because such a charge is preempted by the Federal Trade Commission Act ("FTCA"); and 2) even if the Department of Justice could criminally charge a defendant based on false advertising, it cannot do so unless the FTC certifies the facts necessary for such a charge, which the FTC has not done in this case. See doc. no. 113 at 7. The court addresses each of these arguments in turn.[5]

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[5] In its objection, the government discerns from Arif's motion a third argument: that the FTCA "depriv[es] United States District Courts of jurisdiction over" any matter involving a charge based on false advertising. Doc. no. 115 at 2. The court does not read Arif's motion to challenge the court's jurisdiction, but rather to challenge the government's authority

A. Preemption

Arif first asserts that a charge of wire fraud based on false advertising of drugs is preempted or implicitly repealed by the FTCA. See doc. no. 113 at 7 ("To allow the Government to charge wire fraud . . . where the allegations of fraud fall squarely within the regulatory jurisdiction of the FTCA, guts the intent of 15 U.S.C. §§ 52-57 and renders it meaningless."). In so arguing, Arif "march[es] into the teeth of a strong judicial policy disfavoring the implied repeal of statutes." United States v. Brien, 617 F.2d 299, 310 (1st Cir. 1980); Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored."). "For a court to find implied repeal, there must be a positive repugnancy between the two statutes." Brien, 617 F.2d at 310 (citing United States v. Borden Co., 308 U.S. 188, 198 (1939)). "When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as

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to bring criminal charges based on false advertising. To the extent Arif intended to assert an argument as to the court's jurisdiction over a wire fraud charge, that argument is without merit. See 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States.").

effective." FCC v. NextWave Personal Commc'ns, Inc., 537 U.S. 293, 304 (2003).

Conduct related to false advertising of non-prescription drugs falls within the reach of the FTCA and, therefore, the FTC has jurisdiction to pursue charges based on false advertising. Under Arif's view, because the FTC has the authority to enforce the FTCA, the government cannot bring a charge of wire fraud against Arif based on his allegedly false advertising of non-prescription drugs. Arif must thus show that there is an "inherent conflict" between the wire fraud statute and the FTCA. Nextwave, 537 U.S. at 304.

Arif offers no support for his contention that the FTCA preempts or implicitly repeals the wire fraud statute. The First Circuit, although not directly addressing the FTCA, has rejected similar arguments based on implied repeal. In Brien, defendants convicted of mail and wire fraud challenged their convictions, arguing that the mail and wire fraud statutes were impliedly repealed or preempted by the enactment of more specific provisions of the Commodity Futures Trading Act ("CFTA"). Brien, 617 F.2d at 310. The First Circuit agreed that Congress gave exclusive jurisdiction over commodities futures regulation to the Commodities Futures Trading Commission, but disagreed that the CFTA preempted or impliedly repealed the mail and wire fraud statutes. Id. The court noted

that "[i]t was the fraudulent scheme furthered by use of the mails and interstate telephone calls that brought appellants within the purview of the mail and wire fraud statutes and not the sale of commodity options." Id. The court held that since the mail and wire fraud statutes "are federal general antifraud statutes, they cannot be preempted by the CFTA." Id. Other courts have reached the same conclusion as to the CFTA. See United States v. Shareef, 634 F.2d 679, 680-81 (2d Cir. 1980) (mail fraud statute not implicitly repealed by the CFTA with respect to mail fraud involving commodity futures); United States v. Abrahams, 493 F. Supp. 296, 303-04 (S.D.N.Y. 1980) (CFTA does not preempt or implicitly repeal the mail fraud statute).

While the court has been unable to locate precedent precisely on point, there are numerous cases where the government has successfully prosecuted mail and wire fraud charges based on false or misleading advertising without any suggestion that the charges were precluded by virtue of the FTC having exclusive jurisdiction over the subject matter of false advertising. See United States v. Sloan, 492 F.3d 884 (7th Cir. 2007); United States v. Themy, 624 F.2d 963 (10th Cir. 1980); United States v. Pearlstein, 576 F.2d 531 (3d Cir. 1978); United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966); Blanton v. United States, 213 F. 320 (8th Cir. 1914). Further, courts have

held that the FTCA does not preclude the government from prosecuting a defendant for false advertising under other federal statutes. See United States v. Philip Morris, 263 F. Supp. 2d. 72, 77-78 (D.D.C. 2003) (holding that a federal RICO charge based on false advertising was not preempted by the FTCA, noting "[e]ven though the FTC has exclusive jurisdiction under the FTCA, the statute has never been interpreted to give the agency exclusive jurisdiction over advertising or marketing conduct"); Friedlander v. U.S. Postal Serv., 658 F. Supp. 95, 103 (D.D.C. 1987) ("[T]he existence of [Food and Drug Administration ("FDA")] or FTC jurisdiction over this same matter does not prevent the Postal Service from initiating section 3005 proceedings against companies using the mails in furtherance of a fraudulent scheme.").[6]

Arif has not met the high burden of showing that the FTCA preempts or implicitly repeals the wire fraud statute for charges based on false advertising of non-prescription drugs.

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[6] Further, there is nothing in the legislative history of the FTCA to suggest that Congress intended the statute to repeal other fraud statutes or serve as the exclusive method by which false advertising could be prosecuted. See S. Rep. No. 74-1705 (1936); S. Rep. No. 75-221 (1937); H.R. Rep. No. 75-1613 (1937); & H.R. Rep. No. 75-1774 (1938).

B. Necessity of FTC Certification

Arif next argues that even if the government can bring wire fraud charges against him based on false advertising, FTC "[c]ertification under 15 U.S.C. § 56(b) is a jurisdictional prerequisite to any prosecution premised on false advertising." Doc. no. 113 at 7.

Section 56(b) provides: "Whenever the Commission has reason to believe that any person . . . is liable for a criminal penalty under this subchapter, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought." Arif contends that § 56(b) is the exclusive mechanism by which a federal criminal prosecution may be brought for an alleged FTCA violation.

Arif's argument fails for several reasons. First, § 56(b) provides that the FTC may certify facts to the Attorney General when it has reason to believe that a person is criminally liable "under this subchapter." § 56(b) (emphasis added). Such criminal liability under the subchapter refers to 15 U.S.C. § 54, which provides criminal penalties for false advertising, an offense the government has not charged. Thus even if Arif's reading of the FTCA were correct - that FTC certification is necessary before the government can bring criminal charges against a defendant - the plain language of § 56(b) would

require FTC certification only before bringing charges under the FTCA. Section 56(b) cannot be read to require FTC certification for the enforcement of criminal penalties for another offense, such as wire fraud, and Arif makes no developed argument that it does.

Regardless, Arif's interpretation of § 56(b) is incorrect. Arif does not cite, and the court is not aware of, any authority for the proposition that certification by the FTC under § 56(b) is a jurisdictional prerequisite for criminal prosecution. Indeed, in United States v. St. Regis Paper Co., 355 F.2d 688 (2d Cir. 1966), the Second Circuit addressed the issue of FTC certification to the Attorney General. The court held that FTC certification was a "jurisdictional prerequisite" for actions seeking civil penalties for violations of cease-and-desist orders. See id. at 698. The court noted, however, that the legislative history of the statute made clear "that the Attorney General could prosecute violations of that section on his own motion, without awaiting FTC certification." Id. at 692-93 (emphasis added). The court quoted Congressman Lea, the co-sponsor of the Wheeler-Lea Act, which amended the FTCA to give the FTC authority over false advertising, as stating:

> As to the man who advertises an article injurious to health or advertises with intent to defraud or mislead, the provisions of the bill * * * authorize an immediate prosecution of such a man regardless of what

> the Federal Trade Commission does. He can be arrested and prosecuted immediately.

Id. at 692 n.7 (quoting 83 Cong. Rec. 406 (1938)).

Therefore, Arif's argument as to the necessity of FTC certification before the government can prosecute a defendant for false advertising is based on a misunderstanding of the FTCA. Section 56(b) is not a jurisdictional prerequisite to criminal prosecution. Even if it were, such a prerequisite could only apply to criminal prosecutions brought under the FTCA, and would not apply to other statutes.

For the above reasons, the court holds that, assuming the government would be unable to prove at trial that Arif's websites constituted "labeling" for purposes of the misbranding of drugs charges, it would not be precluded from pursuing charges against Arif under the wire fraud statute. Accordingly, Arif's motion regarding his jurisdictional defense (doc. no. 113) is denied.

II. Good Faith Defense

As discussed above, the court issued an order on September 16, 2016, holding that Arif's proposed good faith defense was not a viable defense to the "intent to defraud" element of the pending wire fraud and misbranding of drugs charges. See doc. no. 108. To meet the requirements of Rule 11(a)(2), Arif filed a "pro se motion for pretrial ruling - intent." See doc. no.

114.[7] In his most recent motion, Arif asserts two new legal arguments in support of his lack of intent to defraud: (A) Arif's business was aimed at inducing purchase from only knowing and willing buyers of non-FDA-approved herbal and homeopathic remedies; and (B) Arif had no intent to harm his customers. Doc. no. 114 at 1. The court addresses each argument below.

A. Purchasers of Non-FDA-Approved Products

Arif argues:

> since his websites were aimed at selling only to a limited circle of knowing and willing buyers and importers of non-FDA approved herbal and homeopathic medicine and any statements on the websites did and could only induce purchases from such buyers, therefore he could not have had the requisite specific intent to defraud. Knowing and willing buyers and importers of non-FDA approved medicine are not defrauded even if such a medicine fails to meet their expectations in some manner.

Doc. no. 114 at 3. Arif appears to be arguing that it is impossible for a seller of non-FDA-approved products to have an intent to defraud customers who purchase such products with the knowledge that they are not FDA-approved, regardless of any

[7] In this motion, Arif reasserts the same argument he made in earlier briefs, i.e., his good faith belief in the efficacy of the drugs negates his intent to defraud. The court has previously determined that, assuming Arif had a personal, good faith belief in the efficacy of the drugs sold on his websites, that good faith belief is not a viable defense to the charges in the superseding indictment. See doc. no. 108. The court incorporates its analysis in document no. 108 into this order.

misrepresentations.[8] Arif cites United States v. Vitek Supply Corp., 144 F.3d 476 (7th Cir. 1998) and United States v. Andersen, 45 F.3d 217 (7th Cir. 1995) in support of his argument. Neither case helps Arif's cause.

In Vitek, the defendants sold premixes, which contained non-FDA-approved drugs, to be added to feed for veal calves. The defendants smuggled the drugs into the United States by either misdescribing the drugs in documents submitted to United States Customs or failing to declare the drugs altogether. The defendants were charged with and convicted of, among other things, misbranding of drugs.

Arif quotes the following language from Vitek: "[D]irect customers were aware that the premixes contained unapproved drugs. Therefore, as the government concedes, these customers were not defrauded." Doc. no. 114 at 2 (quoting Vitek, 144 F.3d at 491). Arif construes that language as standing for the sweeping proposition that a seller of non-FDA-approved drugs cannot legally defraud any customers who knowingly purchase non-FDA-approved drugs.

Arif's reliance on Vitek is misplaced. First, the language quoted by Arif is taken out of context; the language concerns

[8] For purposes of this order, the court assumes that Arif intended to induce the purchase of his drugs by only knowing and willing buyers of non-FDA-approved drugs.

the court's calculation of loss under the United States Sentencing Guidelines. The court's analysis did not concern the defendants' guilt or innocence, and did not bear on the defendants' intent to defraud.

Second, the defendants in Vitek were charged with misbranding of drugs based on their misrepresentations concerning the content of the drugs. Therefore, the fact that the government conceded that the defendants' customers knew the true content of the drugs was relevant to whether the customers sustained any loss from the misrepresentations. Here, however, the government has charged Arif with misbranding of drugs based on Arif's allegedly false statements on his websites concerning cure rates and efficacy, customer testimonials, and research papers. None of Arif's alleged misrepresentations pertains to FDA approval. The fact that Arif's customers may have known the drugs were non-FDA-approved does not bear on the question of whether Arif intended to defraud his customers by making misrepresentations about the efficacy of the drugs, customer testimonials, or research conducted on the drugs.

Arif's reliance on Andersen is also misplaced. In Andersen, the defendants manufactured and sold animal drugs which had not been approved by the FDA. They pled guilty to failing to register a drug manufacturing facility with the FDA with intent to defraud or mislead in violation of 21 U.S.C.

331(p) and 333(a)(2). Andersen, 45 F.3d at 219. Arif asserts that Andersen holds "that there was no quantifiable loss where consumers were very pleased with defendant's product, even though defendant sold said product without FDA approval and made false statements to consumers about the product." Doc. no. 114 at 3.

Andersen's holding is not relevant to Arif's argument. First, as in Vitek, the Andersen court analyzed the issue in the context of calculating loss under the Sentencing Guidelines. The analysis had no bearing on the defendants' guilt or innocence as to the charged offense or whether they had an intent to defraud. Second, in Andersen, the government charged that the defendants intended to defraud the FDA, rather than their customers. Id. at 219, 222. Here, Arif's alleged fraudulent statements on his websites were directed at his customers, not the FDA or any government agency.

Nothing in Vitek or Andersen suggests that a defendant who misleads customers by making misrepresentations to induce the customers to purchase his products, as the government alleges in the superseding indictment, nevertheless acts without intent to defraud or mislead as long as he is truthful about a lack of FDA-approval. Under Arif's theory, a seller of a non-FDA-approved drug could make any misrepresentation, so long as he

did not state that the drug was FDA-approved. No such immunity exists.

In sum, assuming that Arif intended to induce the purchase of his drugs by only knowing and willing buyers of non-FDA-approved drugs, for the above reasons, the court finds that that fact is not a defense to the charges in the superseding indictment.

B. Good Faith

With regard to Arif's good faith argument, the court addresses one additional argument not directly discussed in its earlier order but pressed by Arif in his current motion. That is, Arif now argues that for the government to prove Arif acted with the intent to defraud, "there is a pressing need to independently establish an 'intent to harm' from an 'intent to deceive.'" Doc. no. 114 at 4.

Arif is incorrect. Arif's intent to defraud does not turn on whether he intended to harm his customers. See United States v. DeNunzio, Cr. No. 14-10284-NMG, 2015 WL 5305226, at *4 (D. Mass. Sept. 19, 2015) (differentiating between an intent to harm and an intent to defraud for purposes of wire fraud, and holding that the former is not an element of the offense) (citing United States v. Kendrick, 221 F.3d 19, 29 (1st Cir. 2000) (en banc) and collecting cases)); see also United States v. Appolon, 715

F.3d 362, 368 (1st Cir. 2013); United States v. Mueffelman, 470 F.3d 33, 36 (1st Cir. 2006) (noting that defendant had an intent to defraud for purposes of mail fraud even though "he optimistically believed that his programs would succeed"). Arif's intent to defraud turns on whether he intended to deceive another in order to obtain money or property. See United States v. Pimentel, 380 F.3d 575, 585 (1st Cir. 2004).

In short, for the reasons stated above and in the court's September 16, 2016 order, the good faith defense, as argued by Arif in his briefs before the court, is not a viable defense to the charges in the superseding indictment.

**Conclusion**

For the foregoing reasons, Arif's "motion for pretrial order - jurisdiction" (doc. no. 113) and "pro se motion for pretrial order - intent" (doc. no. 114) are denied.[9]

SO ORDERED.

Landya McCafferty
United States District Judge

October 6, 2016

[9] The court made clear at the September 16, 2016 hearing that, in the event this case proceeds to trial, nothing in any of Arif's pro se briefs shall be used against him at trial, even for impeachment purposes.

cc: Kirsten B. Wilson, Esq.
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Sarah E. Hawkins, Esq.
U.S. Probation
U.S. Marshal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America

v.

Criminal No. 15-cr-057-01LM
Opinion No. 2016 DNH 166

Mustafa Hassan Arif

**O R D E R**

The government has charged defendant, Mustafa Arif, with wire fraud (Count I) and four counts of introducing misbranded drugs into interstate commerce (Counts II - V). The charges arise from alleged misrepresentations Arif made on his websites offering various drugs for sale.

To prove that Arif committed wire fraud, the government must prove that he participated in a scheme to defraud with the intent to defraud. To prove that Arif introduced misbranded drugs into interstate commerce, the government must prove that he acted with the intent to defraud or mislead.[1]

[1] Although the government may charge a defendant with introducing misbranded drugs into interstate commerce ("misbranding of drugs") as a misdemeanor, see 21 U.S.C. §§ 331(a) and 333(a)(1), the government has charged Arif with felony misbranding of drugs under 21 U.S.C. §§ 331(a) and 333(a)(2). Such a charge requires the government to prove that Arif committed the offense with the intent to defraud or mislead.

This criminal trial is highly unusual in two respects. First, it is a bench trial. See doc. no. 42. Second, the parties have agreed to 19 separate, detailed factual stipulations. See doc. no. 94. Pretrial briefing revealed a third potential twist: the possibility of Arif pursuing hybrid representation. A brief summary of the procedural history follows.

In his first trial brief, Arif summarized the four defenses he intends to pursue at trial, including a defense that he lacked the intent to defraud on all five counts.[2] See doc. no. 87. With respect to the lack of intent to defraud defense, counsel indicated in a footnote that counsel did "not endorse[]" that defense and that "Arif seeks leave to argue this position pro se." Id. at n.1

The court scheduled a hearing to address Arif's request for hybrid representation. Prior to the hearing, the government filed a "memorandum regarding pro se representation" (doc. no.

[2] The government argues in their briefs that an "intent to mislead" is broader than an "intent to defraud." For purposes of this order, the court presumes, without deciding, that the the term "intent to mislead" under the misbranding of drugs statute is, for all intents and purposes, identical to an intent to defraud. See United States v. Watkins, 278 F.3d 961, 966-69 (9th Cir. 2002). Therefore, the court will refer to the intent element of the charged offenses as "intent to defraud."

98), in which it opposed allowing the type of hybrid representation proposed by Arif (i.e., allowing Arif to have counsel represent him on all but the "intent to defraud" theory of his defense, and permitting Arif to represent himself on that theory of his defense). The government proposed that the court allow Arif to represent himself pro se, after a knowing waiver, but appoint standby counsel.

The hearing took place on September 2, 2016. Early on in the hearing, defense counsel moved to seal the hearing so that counsel and Arif could address the court on an ex parte basis, and the court could hear privileged details about the genesis of the hybrid representation request. The court granted that request and heard from Arif and counsel.

After the court reopened the hearing to the public, the court proposed that the legal issue at the heart of the dispute between Arif and his counsel appeared ripe for ruling by the court as a matter of law. That is, the court could decide whether Arif's defense to the "intent to defraud" element in all five counts was a legal and viable defense to the charges in the superseding indictment. In so doing, the court would presume the truth of Arif's subjective, good faith defense, and consider any relevant factual stipulations.

Arif agreed that the question was a matter of law for the

court, and that the court's ruling on the question would likely obviate his need for hybrid counsel. That is, in the event that the court rules that Arif's intent to defraud defense is legally viable, Arif's counsel would agree to pursue that defense at trial on his behalf. On the other hand, in the event the court ruled that Arif's defense was not viable, Arif acknowledged that he would not pursue that defense on a pro se basis at his trial, but would reserve his appellate rights on the issue. Arif requested that the court decide this issue as a matter of law prior to trial.

The government agreed that the issue could be decided as a matter of law. Additionally, the government offered that it had proposed in discussions with defense counsel, although in an entirely different context, a similar pretrial resolution of this issue. The court permitted further briefing on the issue by the parties, (Arif, on a pro se basis), and set a deadline of September 9, 2016.

The court must clarify the limited universe of facts it is considering here. There are only two appropriate sources for the court: (1) the parties' 19 factual stipulations; and (2) facts asserted by Arif in his pro se briefs that the court construes favorably to him for purposes of this legal analysis, such as his statement that he had a good faith belief in the

efficacy of the drugs offered for sale on his websites. The court will not consider any statement by Arif that he has included in his briefs that could be construed adversely to him, such as his admission that the purpose of the false testimonials on his websites was to induce customers to purchase his drugs.

Having reviewed the parties' briefs on this issue, the court begins by summarizing the relevant factual stipulations. See doc. no. 94.

**Stipulated Facts**

Mustafa Arif owned and operated MAK International. Arif and/or MAK International created and maintained more than 1,500 websites, more than 1,000 of which offered drugs[3] for sale. The remaining websites acted as referral sites, directing potential customers to one or more of the websites offering drugs for sale.

The websites contained several representations regarding the efficacy and/or cure rates of the various drugs. They also contained links to research papers, which discussed clinical

[3] The Food, Drug, and Cosmetic Act defines the term "drug," in relevant part, as "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and . . . articles (other than food) intended to affect the structure or any function of the body of man or other animals . . . ." 21 U.S.C. § 321(g)(1).

tests conducted on the particular drug being promoted, as well as testimonials from customers. "All claims on all web sites regarding efficacy and/or cure rates were unsupported by clinical studies conducted" by Arif or any entity Arif controlled. Doc. no. 94 at ¶ 7. The research papers listed on the websites "were plagiarized and were not written about the drugs they purported to reference." Id. at ¶ 8. Additionally, "[t]he testimonials listed on the websites were fictitious." Id. at ¶ 9.

Although Arif managed the websites and his business from Pakistan, the websites were registered to entities with addresses listed in other countries, including Italy, New Zealand, Australia, Norway, and Denmark. Any mail sent to those addresses was forwarded to Arif in Pakistan. Arif used these addresses to make prospective customers more comfortable purchasing the products.

The drugs sold on Arif's websites "purported to be homeopathic remedies," doc. no. 94 at ¶ 16, or "purported to contain herbs and other natural ingredients as listed," id. at ¶ 17, consistent with naturopathic remedies. Both homeopathy and naturopathy are alternative systems of medicine that are practiced, in good faith, by many believers.

In the process of purchasing drugs from Arif's websites,

customers were redirected to a different website, for a company called "CCNow," that processed all sales for Arif's websites. CCNow is a company located in Minneapolis, Minnesota. CCNow transmitted the proceeds of all the sales, less a fee, to Arif's bank accounts located in England and Pakistan.

Before completing their purchases through CCNow, Arif's customers were required to read and certify the following:

> I understand and acknowledge the following: (a) actual product packaging and materials may contain more and/or different information than that shown on the website through which the product(s) are purchased; (b) I will read and follow all labels, warnings and directions in connection with using or consuming the product(s), and will contact a health care provider immediately if I suspect I have a medical problem or reaction; (c) the content on this website is for reference purposes and is not intended to substitute for advice given by a physician, pharmacist, or other licensed health-care professional; (d) the product(s) purchased are not intended to diagnose, mitigate, treat, cure or prevent any disease or health condition, and I will not use any information or statements contained on the website through which this product is purchased, or contained on or in such product(s), for such purposes.

**Discussion**

Arif was indicted on one count of wire fraud in violation of 18 U.S.C. § 1343 (Count I) and four counts of misbranding of drugs in violation of 21 U.S.C. §§ 331(a), 333(a)(2), and 352(a) (Counts II - V). The parties agree that intent to defraud is an element of both wire fraud and misbranding of drugs as charged

in the superseding indictment.

Arif intends to argue at trial that he is not guilty of any of the charges because he had a good faith belief in the efficacy of the drugs sold on the websites. He intends to argue that his good faith belief proves that he did not have an intent to defraud and such evidence will, therefore, require a verdict of not guilty on all counts. The government disagrees and argues that even assuming the truth of Arif's subjective, good faith belief in the efficacy of the drugs, such a personal good faith belief is not relevant to the intent to defraud element based on the charges in the superseding indictment. The parties have agreed that the question is one of law that the court can decide in advance of trial.

In addressing Arif's argument, the court assumes for purposes of this order that the evidence at trial would show that Arif had a good faith belief in the efficacy of the products he sold on his websites.

## I. Arif's Good Faith Belief in the Efficacy of the Drugs

At trial, Arif intends to offer the defense that he had an honest belief the drugs he sold on his websites were efficacious; that is, that he believed each drug would

successfully treat the specified diseases.[4] Arif contends that, in light of his good faith belief, "the government misconstrues *as a matter of law* the very essence of what constitutes actual fraud in a case such as this." Doc. no. 103 at ¶ 3 (emphasis in original). Arif reasons that "once it is averred that defendant *may have had an honest belief that his remedies work* then, in the very same breath, the allegation is actually conceded that defendant [never] sold his remedies to intentionally 'defraud' his customers." Id. (emphasis in original).

"The elements of wire fraud under 18 U.S.C. § 1343 are '(1) a scheme or artifice to defraud using false or fraudulent premises; (2) the defendant's knowing or willing participation in the scheme or artifice with the intent to defraud; and (3) the use of the interstate wires in furtherance of the scheme.'" United States v. Foley, 783 F.3d 7, 13 (1st Cir. 2015) (quoting United States v. Appolon, 715 F.3d 362, 367 (1st Cir. 2013)). Intent to defraud "excludes false statements honestly believed to be true and promises or predictions made in good faith." United States v. Mueffelman, 470 F.3d 33, 36 (1st Cir. 2006) (discussing intent to defraud as an element of mail fraud); see

[4] Arif asserts numerous other arguments with respect to his lack of an intent to defraud. Arif's primary argument, however, is that he had a good faith belief in the efficacy of the drugs. The court addresses only Arif's primary defense in this order.

also United States v. Martin, 228 F.3d 1, 15 (1st Cir. 2000) (noting identical analysis of the elements of wire fraud and mail fraud).[5]

Arif's good faith defense is based on his misunderstanding of the charges against him. Arif is not being charged with selling drugs that did not work as intended, for selling homeopathic or naturopathic remedies, or for harming his customers. Arif is charged with making misrepresentations on his websites, including plagiarizing research papers about other drugs, creating false testimonials, inventing clinical studies which did not exist, and creating fake addresses for the entities to which the websites were registered. Arif does not contend in his briefs that he had a good faith belief in the truth of the false statements on his websites. Rather, Arif intends to offer evidence that he had a good faith belief in the efficacy of the drugs, and he argues that this belief is a complete defense to the intent to defraud element of his charged offenses.

[5] As discussed above, the misbranding of drugs charges in the superseding indictment also require the government to prove that Arif acted with the intent to defraud. Neither party argues, and the court has been unable to locate, any case law holding that the test for "intent to defraud" in the misbranding statute is different in any material respect from that in the wire fraud statute.

Arif's defense is nearly identical to the one the defendant raised in Mueffelman, 470 F.3d at 36. In Mueffelman, the defendant and a partner created a business venture, which offered to assist persons who were poor or had low credit ratings in acquiring homes. The venture charged clients for enrolling in the assistance program. Throughout the venture's existence, the defendant made several misrepresentations to attract clients, including guaranteeing financing terms which it could not secure, inventing the existence of established relationships with lenders and government-supported loan programs which did not exist, and falsely claiming that the venture was an "investor, when in fact it did no more than seek lenders." Id. The defendant was convicted of several counts of mail fraud.

On appeal, the defendant in Mueffelman admitted he made the various false statements as alleged in the indictment. He argued, however, that he did not have the intent to defraud his clients, which, as with wire fraud, is a necessary element of mail fraud. In support, the defendant argued that he lacked the intent to defraud "because he optimistically believed that his programs would succeed" and that "his business was not a sham enterprise." Id. at 36.

The First Circuit affirmed the defendant's conviction. The court acknowledged that a good faith defense on intent to defraud is an absolute defense available to defendants. Such a defense is available where a defendant can show he honestly believed in the truth of his alleged false statements, or made promises and predictions in good faith. Id. at 36-37. On the other hand, the court stated:

> This is a far cry from saying that Mueffelman was free knowingly to make false statements to secure money from clients because he believed that his enterprise would succeed. One can be optimistic, even with good reason, about the prospects of a business, but one still cannot, for example, sell stock by lying about the business' past earnings or the presence of booked orders that do not exist. A prediction made in good faith may be sheltered; a statement of fact known to be false is not.

Id. at 37. Every other circuit to address this question has found that a subjective good faith belief in the efficacy of a product cannot negate intent to defraud where a defendant made false statements about the product to induce purchase of the product. See United States v. Spirk, 503 F.3d 619, 622 (7th Cir. 2007) (good faith belief that investors would profit does not negate an intent to defraud because "people who want to raise money cannot obtain it by deceit and then try to persuade a jury that their intentions were good"); United States v. Benny, 786 F.2d 1410, 1417 (9th Cir. 1986) (an honest belief in

the truth of misrepresentations may negate an intent to defraud; a good-faith belief that the victim will suffer no loss is "no defense at all"); United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) (good-faith belief in enterprise does not excuse false or reckless representations); United States v. Townley, 665 F.2d 579, 585 (5th Cir. 1982) ("[N]o amount of good-faith intent to deliver and good-faith belief in the ultimate success of the business could constitute a good-faith defense exculpating [the defendant] from criminal liability for his false and misleading statements in connection with the ads, letters, and statements by [the defendant] . . . , by which the investors/purchasers funds were obtained."); Sparrow v. United States, 402 F.2d 826, 828 (10th Cir. 1968) ("[N]o matter how firmly the defendant may believe in the plan, his belief will not justify baseless, false, or reckless representations or promises."); United States v. Painter, 314 F.2d 939, 943 (4th Cir. 1963) ("[N]o amount of honest belief that his corporate enterprise would eventually succeed can excuse the willful misrepresentations by which the investors' funds were obtained.").

Arif distinguishes his case because it involves what he calls "medicinal marketing." He believes that bona fide disputes over a product's efficacy necessarily negate any

fraudulent intent as a matter of law, citing Am. Sch. Of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). The holding of McAnnulty might weigh in Arif's favor at trial if the evidence shows, for example, that he confined the representations on his websites to statements about his subjective belief in the drugs' therapeutic value, or that he posted on his websites actual consumer testimonials about the drugs' efficacy or actual opinions from medical professionals. But, Arif is not making this argument in his briefs. Instead, he is arguing on the basis of his honest belief in the efficacy of the drugs. Based on the charges in the superseding indictment, that good faith belief is irrelevant, as a matter of law, on the question of intent to defraud.

To illustrate the problem with Arif's legal argument, the court will use a hypothetical example. Suppose that, in searching for an attorney to represent him in a case, a defendant interviews a number of attorneys. One of those attorneys holds a good faith belief in himself as the "greatest defense attorney in the world." During his interview, the lawyer provides the defendant with the following: false newspaper clippings lauding the lawyer's performance in trials; fake testimonials from non-existent defendants explaining how the lawyer secured their acquittals; and a fabricated American

Bar Association story stating that the attorney has won 99% of his criminal trials. He also provides the defendant with a fake address for his office, located in an upscale area to make the defendant more comfortable with hiring him. Under Arif's view of the law, the lawyer did not intend to defraud the defendant because the lawyer truly believed he was an incredibly effective defense attorney, regardless of any misrepresentations he made to induce the defendant to hire him. For obvious reasons, that is simply not the way the law works.

In short, in light of the charges in the superseding indictment, Arif's intent to defraud depends on whether he intended to deceive potential customers about his drugs to induce them to purchase those products. Therefore, as a matter of law, Arif's good faith belief in the efficacy of his drugs is irrelevant as to his intent to defraud in this case, and is not a viable defense.

II. Summary

Arif argues, as a matter of law, that his honest belief in the efficacy of his products absolves him of any intent to defraud, which is an element of all of the charged offenses. Although good faith is a defense to an intent to defraud, for the defense to be viable in this case, Arif would need to show

that he had a good faith belief that the allegedly false representations on his websites were truthful (i.e., that the research papers were actually written about the drugs on his website, or that the client testimonials were drafted by actual clients about the drugs on his websites). In light of the charges in the superseding indictment, however, Arif's good faith belief in the efficacy of his products is not, under these circumstances, a viable defense to the charge that Arif acted with an intent to defraud (for purposes of the wire fraud charge) or an intent to defraud or mislead (for purposes of the misbranding of drugs charges).

In short, the good faith defense, as argued by Arif in his briefs before the court, is not a viable defense to the charges in the superseding indictment.

SO ORDERED.

Landya McCafferty
United States District Judge

September 16, 2016

cc: William E. Christie, Esq.
Sarah E. Hawkins, Esq.
Arnold H. Huftalen, Esq.
Robin D. Melone, Esq.
Kirsten B. Wilson, Esq.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW HAMPSHIRE**

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| **UNITED STATES OF AMERICA** | ) | |
| | ) | |
| **v.** | ) | **1:15-cr-00057-LM** |
| | ) | |
| **MUSTAFA HASSAN ARIF** | ) | |
| | ) | |

**Factual Trial Stipulations**

With respect to the trial in the above captioned matter, the evidence includes facts to which the parties have agreed and hereby stipulate. In this context, stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. Wherefore, it is respectfully requested that the Court accept the 19 stipulations enumerated below as fact, to be given whatever weight the Court chooses.

2.01 Stipulations--Pattern Criminal Jury Instructions for the District Courts of the First Circuit, District of Maine, Internet Site Edition. Updated June 24, 2015 by Chief District Judge Nancy Torresen.

For all times relevant to the Superseding Indictment:

1. MAK International was owned by Mr. Arif.
2. Mr. Arif, individually and/or through an entity or entities he controlled, created and controlled more than 1,500 web sites (hereafter "websites" or "the websites"), of which more than 1,000 offered drugs for sale, with the remainder acting as referral sites directing potential customers to one or more of the websites offering drugs for sale.
3. The websites offering drugs for sale were grouped under, or within, what the government refers to as subnetworks and were generally known by the names that follow, with each sub network consisting of approximately the number of web sites listed below:
    a. Berlin Homeo-more than 250 websites;
    b. Botanical Sources-more than 200 websites;
    c. Gordon's Herbal Research Center-more than 120 web sites;

d. Healing Plants Ltd.-more than 60 websites;
e. Oslo Health Network-over 300 websites;
f. Solutions by Nature-over 70 web sites.

4. Two subnetworks, known as Society for the Promotion of Alternative Health (SPAH) and Towards Natural Health, consisted of approximately over 400 websites that purported to independently refer potential customers to one or more of the websites that offered drugs for sale.

5. All websites under, or within, a particular subnetwork were similar in visual appearance, such as similar graphic images and color schemes.

6. All websites were registered by and to either Mr. Arif or an entity over which Mr. Arif maintained control.

7. All claims on all web sites regarding efficacy and/or cure rates were unsupported by clinical studies conducted by Mr. Arif or his companies.

8. The research papers referred to in the Superseding Indictment were plagiarized and were not written about the drugs they purported to reference.

9. The testimonials listed on the websites were fictitious.

10. Mr. Arif ran and managed his business and all of the websites from Pakistan.

11. All addresses purportedly associated with each of the subnetworks (Berlin Homeo-Germany, Botanical Sources-Italy, Gordon's Herbal Research Center-New Zealand, Healing Plants Ltd.-Australia, Oslo Health Network-Norway, Solutions by Nature-Denmark, Society for the Promotion of Alternative Health (SPAH)-England, and Towards Natural Health-Scotland) were mail forwarding addresses rented by Mr. Arif and were used to make prospective customers more comfortable purchasing Mr. Arif's products.

12. CCNOW, doing business in Minnesota, was an authorized retailer, having been authorized by Mr. Arif, and processed all sales for all of the websites. At the direction of Mr. Arif, CCNOW transmitted the proceeds of the sales (minus CCNOW's margin, which included a per transaction fee plus a percentage of each sale, and consumer refunds) to, and for, the benefit of Mr. Arif, to bank accounts in England and Pakistan, as set out in the Superseding Indictment.

13. Mr. Arif dealt directly with Matthew Lind at CCNOW via email and telephone.

14. CCNOW maintained records of all transactions that were processed through the websites, and those records accurately reflect said transactions.

15. No prescription was required in order to purchase any drug through any of the websites.

16. Homeopathy is an alternative system of medicine that is practiced, in good faith, by many believers. The Berlin Homeopathic series of products were purported to be homeopathic remedies.

17. Naturopathy is an alternative system of medicine that is practiced, in good faith, by many believers and often involves the use of herbal remedies. The products offered for sale thorough websites, in the subnetworks other than in the Berlin Homeo subnetwork, purported to contain herbs or other natural ingredients as listed.

18. All purchases from all websites referenced in the indictment were completed through the CCNow shopping cart page. This page contained the following statement, which customers were required to affirmatively acknowledge before being able to complete their purchase:

> I understand and acknowledge the following: (a) actual product packaging and materials may contain more and/or different information than that shown on the website through which the product(s) are purchased; (b) I will read and follow all labels, warnings and directions in connection with using or consuming the product(s), and will contact a health care provider immediately if I suspect I have a medical problem or reaction; (c) the content on this website is for reference purposes and is not intended to substitute for advice given by a physician, pharmacist, or other licensed health-care professional; (d) the product(s) purchased are not intended to diagnose, mitigate, treat, cure or prevent any disease or health condition, and I will not use any information or statements contained on the website through which this product is purchased, or contained on or in such product(s), for such purposes.

19. Mr. Arif did not represent that the drugs were FDA-approved.

August ___, 2016

I, Mustafa Hassan Arif, having conferred with counsel, hereby stipulate and agree to the above enumerated 19 factual stipulations, including subparts a-f in stipulation 3:

Mustafa Hassan Arif, defendant

On behalf of the defendant, Mustafa Hassan Arif:

Kirsten Wilson, Esq.
Counsel to defendant, Mustafa Hassan Arif

Robin Melone, Esq.
Counsel to defendant, Mustafa Hassan Arif

On behalf of the United States of America:

Emily Gray Rice
United States Attorney

By: Arnold H. Huftalen
Assistant United States Attorney
District of New Hampshire

By: Sarah Hawkins
Senior Counsel
Office of Chief Counsel
U.S. Food and Drug Administration

# United States Court of Appeals
## For the First Circuit

No. 17-1597

UNITED STATES

Appellee

v.

MUSTAFA HASSAN ARIF

Defendant - Appellant

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron,

Circuit Judges.

**ORDER OF COURT**

Entered: August 17, 2018

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Michael R. Schneider
Kirsten Bell Wilson
Benjamin Brooks
Mustafa Hassan Arif
Seth R. Aframe
Arnold H. Huftalen

Additional material from this filing is available in the Clerk's Office.